SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 109.

MARGARET E. SNYDER, Also Known as PEG SNYDER,
Petitioner,

vs.

CHARLES HARRIS and EARL W. KIRCHHOFF,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

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OPINIONS BELOW.

The opinion of the Court of Appeals (R. 29-30) is reported at 390 F. 2d 205. The opinion of the United States District Court of Missouri is not reported and is set forth at R. 21.

JURISDICTION.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 27, 1968 (R. 31). Petitioner's Petition for Rehearing, or, in the

alternative, to transfer to the court en banc, was duly and timely filed in said United States Court of Appeals for the Eighth Circuit (R. 32). Said Petition for Rehearing, or, in the alternative, to transfer to the court en banc, was denied on March 22, 1968 (R. 43). Petitioner's petition for a writ of certiorari was filed May 17, 1968 and was granted October 21, 1968.

The jurisdiction of this court is invoked under 28 U. S. C., 1254 (1).

QUESTION PRESENTED.

Whether under Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where a class action under the amended rule is otherwise appropriate.

STATUTE AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED.

28 U. S. C., § 1332 (a) (1): The said 28 U. S. C., § 1332 (a) (1) provides:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;"

Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966. The provisions in said rule are lengthy and the text is set forth in Appendix A hereto, infra, p. 19.

STATEMENT.

Petitioner filed this class action pursuant to Amended Rule 23, Federal Rules Civil Procedure, effective July 1, 1966 in the United States District Court for the Eastern District of Missouri, Eastern Division, to recover judgment in the amount of $1,200,000.00 for the class (R. 6). In her Amended Complaint (R. 6-10) Petitioner alleged that:

Petitioner is a citizen of Arizona and the Respondents are citizens of Missouri; there is diversity of citizenship, and the amount in controversy exceeds $10,000.00 exclusive of costs and interest; since prior to November 22, 1966, Petitioner has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (Missouri Fidelity) and owns 2,000 of said company's shares; the bylaws of Missouri Fidelity provide for a board of fifteen directors and Respondents at all times relevant were members of said board; on or about November 22, 1966 eight of the Missouri Fidelity directors including the Respondents entered into an agreement with National Western Life Insurance Company (National Western) whereby and in pursuance of which National Western purchased from such eight directors and relatives and friends of theirs 300,000 Missouri Fidelity shares and paid them therefor a premium of about $1,200,000.00 in excess of the then market price and as condition for such purchase said eight directors resigned, and such proceedings were had that five nominees of National Western were elected directors of Missouri Fidelity and as a majority of its executive committee and of its investment committee; such premium of $1,200,000.00 was paid by National Western for the resignations of the directors who so resigned and for the obtaining of control of the executive committee and investment committee of Missouri Fidelity; the mentioned conduct and acts of said eight directors including Re-

spondents were a breach of trust and in violation of their duties as Missouri Fidelity directors;

The class of shareholders of Missouri Fidelity consists of more than 4,000 persons residing in different states and it would not be practical for all of them to join or be joined in this action and Petitioner brings this action on behalf of herself and all other shareholders of Missouri Fidelity; that by reason of the aforesaid matters the said premium of approximately $1,200,000.00 should be distributed to Petitioner and the other shareholders of Missouri Fidelity similarly situated.

The prayer in the amended complaint prayed that the Court enter its Order determining that a class action shall be maintained and that the Court enter judgment in the amount of $1,200,000.00 in favor of Plaintiff and other Missouri Fidelity shareholders in accordance with the Missouri Fidelity shares held by them respectively and for attorneys' fees and costs and that the Court's judgment include and describe those whom the Court finds to be members of the class.

The Respondents filed a motion to dismiss the Amended Complaint (R. 10-12). Such motion alleged various grounds for dismissal of the Amended Complaint, including lack of jurisdictional amount. In its Opinion the District Court stated that for reasons set forth in its Opinion the Court need only consider the question of lack of jurisdictional amount (R. 21).

The Respondents contended that if the Petitioner has pleaded a class action, she has pleaded a "spurious" class action and that the jurisdictional amount in such action may not be determined by aggregating the amounts which might be claimed by others in the class action, and that the Petitioner's individual claim can amount to no more than $8,740.00. The Petitioner, on the other hand, contended that since "spurious" class actions no longer

exist under Rule 23, F. R. C. P., as amended July, 1966, and since a judgment in any class action under said Amended Rule 23 is now binding upon the entire class, the claims of the entire class are in controversy and should, therefore, be aggregated in arriving at the jurisdictional amount (R. 23).

The District Court sustained Respondent's motion to dismiss Petitioner's Amended Complaint and dismissed the action without prejudice on the ground that Petitioner's claims are separate and distinct from those of other persons in the class, that Rule 23 as amended has not changed the rule existing prior to the amendment, that in such a case the claims could not be aggregated in arriving at the jurisdictional amount, that therefore Petitioner may not aggregate her claim with those of others in the class, that Petitioner alleged her damages at $8,740.00, and that accordingly, the amount in controversy does not exceed $10,000.00 and the Court therefore lacked jurisdiction over the controversy (R. 21).

On Petitioner's appeal, the District Court's said Order and Judgment was affirmed on February 27, 1968, by the United States Court of Appeals for the Eighth Circuit on the basis of the District Court's opinion and of the opinion of the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir. 1967), cert. denied, 389 U. S. 826 (1957) (R. 29). Rehearing was denied on March 22, 1968 (R. 43).

On February 23, 1968, in the case of **The Gas Service Company v. Coburn, etc.**, 389 F. 2d 831 (10th Cir. 1968), the United States Court of Appeals for the Tenth Circuit rendered a decision in direct conflict with the above mentioned opinions of the District Court and of the Court of Appeals for the Eighth Circuit, and of the ruling of the Fifth Circuit in **Alvarez**, above mentioned, on which the Eighth Circuit relied in the instant case.

On March 14, 1968, Petitioner timely filed in the Eighth Circuit Court of Appeals her Petition for Rehearing or in the Alternative, to Transfer to the Court En Banc and therein called attention to the above mentioned ruling and decision of the Tenth Circuit Court of Appeals and filed with her said Petition as an appendix thereto a copy of the Opinion of the Tenth Circuit in **The Gas Service Company**, supra (R. 43).

In **The Gas Service Company v. Coburn**, supra, the United States Court of Appeals for the Tenth Circuit expressly held that even though the claims of the individuals constituting the class in the case there presented were neither "joint" nor "common" yet under Rule 23, Fed. R. Civ. P., as amended in July 1966, the claims of the entire class were in controversy and could be aggregated for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., Section 1332. With respect to the decision of the United States Court of Appeals for the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992, relied on by the Eighth Circuit in the instant case, the Tenth Circuit stated: "We must respectfully disagree."

Petitioner's said Petition for Rehearing, or in the Alternative to Transfer to the Court en Banc, was denied by the Eighth Circuit Court of Appeals on March 22, 1968 (R. 43). Petitioner's Petition for a Writ of Certiorari was filed May 17, 1968 and was granted October 21, 1968.

ARGUMENT.

The July, 1966 Amendment of Rule 23 of the Federal Rules of Civil Procedure Extinguished the Distinction Between "True" and "Spurious" Class Actions and Made Permissible the Aggregation of Several and Distinct Claims for the Purpose of Satisfying the Diversity Jurisdictional Amount Requirement of 28 U. S. C., Section 1332, Where a Class Action Is Otherwise Validly Instituted.

Petitioner submits that the "amount in controversy" jurisdictional requirement of $10,000.00 exclusive of interest and costs is satisfied in the present case since the aggregate amount of the claims of the class is in excess of $1,000,000.00 (R. 6).

Under former Rule 23, class actions were of three types: (1) hybrid, (2) true, and (3) spurious. The distinction was based upon the so-called "jural" relationship of the class members. One of the consequences of deciding which type of class action was involved in a given case was a determination as to whether class members could aggregate their respective claims to satisfy the amount in controversy requirement. If one filed a "true" class action, it followed that the members' relationship was "joint" and therefore the claim was not "several" and aggregation was permitted. However, a "spurious" class action meant, *inter alia*, that the members' relationship, though "common," was "several" and therefore aggregation was not permitted. **Pinel v. Pinel**, 240 U. S. 594 (1916).

In **Barron and Holtzoff, Federal Practice and Procedure**, Sec. 569, pp. 322-23, the following definition is given to a "spurious" class action under Subdivision (a) (3) of the former Rule 23:

> "A 'spurious' class action under subdivision (a) (3) of this rule (former rule 23) in which the rights

sought to be enforced are several, and there is a common question of law or fact and common relief is sought, **is in effect a congeries of separate actions**" (Emphasis supplied).

In **All American Airways v. Elder**, 209 F. 2d 247 (2nd Cir.), the Court stated at page 248:

> "In justice to the litigants it must be admitted that there still seems considerable confusion as to the meaning and effect of the third group of class actions authorized by F. R. 23 (a), 28 U. S. C. A., a confusion not lessened by the load it bears in its popular legal cognomen of 'spurious class action.' There is perhaps something anomalous in apparent legal participation in a lawsuit by persons unnamed and unidentified as individuals who, unless they show themselves by intervening, remain legally unaffected by any action taken in the case. The legal rationale lags behind the practical utilities found in the device and its 'psychological value' (3 Moore's Federal Practice 3445, 2d Ed. 1948) on courts and potential litigants. It stands as an invitation to others affected to join in the battle and an admonition to the court to proceed with proper circumspection in creating a precedent which may actually affect non-parties, even if not legally *res judicata* as to them. Beyond this, as we in common with other courts have pointed out, it cannot make the case of the claimed representatives stronger, or give them rights they would not have of their own strength, or affect legally the rights or obligations of those who do not intervene."

From the above it is clear that under the former Rule 23 the courts and legal authorities considered a "spurious" action as (1) consisting of "separate actions" in which the plaintiffs merely joined for convenience sake and (2) that no judgment could be binding on a member

of the named class unless the member of the class actually intervened and (3) there could in one case be separate and inconsistent judgments—i. e., a judgment in favor of one member of the class and a judgment against another member of the class.

Under Amended Rule 23 there can only be **one** action as the said Rule specifically provides for **one** judgment. In said Amended Rule 23 it is provided:

"• • • • • • • •

"(B) **the judgment**, whether favorable or not, will include all members who do not request exclusion;" (Emphasis supplied)

• • • • • • • •

"**The judgment** in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. **The judgment** in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class" (Emphasis supplied).

It is easily ascertained from the above that in the type of class actions contemplated by Amended Rule 23 there can only be one **consistent** judgment as to all members of the class who have not chosen to be excluded.

One might ask how can there always be one consistent judgment as to all members of the class—what is to happen in a fraud case where as to each member of the class there may be such independent questions as "right to rely" (in **Miller v. National City Bank of New York**, 166 F. 2d 723 (2nd Cir.), the court refused aggregation

because of the independent question "right to rely"). The Amended Rule 23 protects the defendant as to his right to raise individual defenses in that it is provided in the Rule that before a class action may be maintained there must be "questions of law or fact common to the class" and that "the claims or defenses of the representative parties are typical of the claims or defenses of the class". Therefore, in a fraud type action the court could very well hold that the action was not a proper one to be brought as a class action under Rule 23 as there is no "common question of law or fact common to the class" and "the claims or defenses of the representative parties" are not typical of the claims or defenses of the class.

In the instant case there can be no question but that the questions of law and of fact are identical as to each member of the class and any defense the respondents might have would have to be identical as to each member of the class.

The Eighth Circuit Court of Appeals, in the case at bar, relied on the Fifth Circuit case of **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir.). Petitioner believes that the **Alvarez** case is erroneous. In **Alvarez** the Court held that the Amended Rule 23 could not increase Federal jurisdiction or Federal jurisdictional amount and that in the type of action formerly known as a "spurious class action" the Court, in spite of amended Rule 23, in determining the "amount in controversy" requirement, must look only at the amount affecting each individual plaintiff and not the amount affecting the class. In **Alvarez**, the Court, in sole support of its position, stated that Rule 82, F. R. Civ. P., provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States District Court * * *".

Rule 82 is completely inapplicable as the new Rule 23 does not in any way affect jurisdictional amount or create jurisdiction in different types of actions. It simply provides a **procedure** where there can be **one** judgment binding an entire class under circumstances such as the case at bar—it simply provides for one single action, in cases such as the one at bar, where prior to its enactment the courts treated such a case as consisting of separate actions subject to separate judgments and not binding on the class unless the member of the class actually intervened.

How is it possible to say in the instant case that the "amount in controversy" does not exceed $10,000 where there could be **one** judgment in excess of $1,000,000 binding the whole class and in which members of the class would be bound (unless they exclude themselves as above mentioned) regardless whether or not they joined in the law suit?

If the court in **Alvarez** in relying on Rule 82, is correct then amended Rule 23 would have to be declared invalid as the Rule extends the binding effect of "the judgment" to include members of the class whether or not they have intervened in the action where prior to said Rule they were not bound by the court's judgment. Applying the reasoning of **Alvarez** the binding effect of a judgment in a class action on members of the class who have not actually joined in the action would be an extension of "jurisdiction" prohibited by Rule 82.

The Fifth Circuit case of **Texas Employers Ins. Assn. v. Felt**, 150 Fed. 2d 227 (5th Cir.) is very much in point and very much contrary to the reasoning in the **Alvarez** case. In **Texas Employers** the Court had under consideration Rule 20 which provides that all persons may be joined in one action as Defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief

in respect of or arising out of the same transaction or occurrence and if any question of law or fact common to all of them will arise in the action. The Court considered the effect of Rule 82 on Rule 20, which said Rule 82, as above set forth, provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States District Court * * *".

The Court held that Rule 20 **"does not effect jurisdiction but it regulates procedure"** (Id. at 231). (Emphasis supplied.)

The new Rule 23 also regulates "procedural" and does not affect "jurisdiction". It merely provides procedure in class actions for one binding judgment against all members of the class except those who have given notification of their desire to be excluded.

The Court in **Texas Employers**, supra, stated at pages 231-232:

> "There is no procedural reason why a single suit may not be maintained in the Federal Court if the Plaintiff's right to relief arises out of the same transaction and presents a question of law or fact common to all of the Defendants."

Similarly, there is no "procedural reason" why amended Rule 23 cannot provide for one binding judgment on all members of the class.

The Gas Service Company v. Coburn, 389 F. 2d 831 (10th Cir.), is in direct conflict with said **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir.), and directly supports Petitioner's contentions herein. In **The Gas Service Company case**, the Court stated at page 834:

> "It is true, of course, that the rule-making power does not include the right to create or abrogate sub-

stantive law and that as a consequence no rule can lift or lower the $10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In Gibbs v. Buck, 307 U. S. 66, 72, the Supreme Court stated it thus:

> '. . . federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value.'

Rule 23 before or after amendment does not purport to affect this principle."

"The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.[5] The Advisory Committee's Note, 39 F. R. D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as 'true', 'hybrid', and 'spurious'. 'In practice', said the Committee, 'the terms "joint", "common", etc., which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain.' These terms were eliminated in the amendment and a purely pragmatic classification was adopted. **The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of 'true', 'hybrid' and 'spurious' must be perpetuated to allow or defeat ag-**

gregation would seem to render the rule sterile in that regard" (Emphasis supplied).

With respect to the Fifth Circuit Court of Appeals decision in **Alvarez**, supra, the Tenth Circuit Court of Appeals stated at page 834:

"We must respectfully disagree."

The case of **Snyder v. Epstein, et al.**, now pending in the United States District Court for the Eastern District of Wisconsin, Cause No. 66-C-329, also directly supports Petitioner's contentions herein (This case is not yet reported and is set forth in Appendix B hereto. Petitioner is the Plaintiff in said Wisconsin **Snyder** case, supra, and the action is identical to the one at bar, with the exception of the defendants, who are two of the directors of Missouri Fidelity that are not subject to service of process in the instant case.) In **Snyder v. Epstein**, supra, the Wisconsin District Court in permitting aggregation stated that (page 33 of Appendix B hereto):

> "The purposes of class actions would be largely defeated, especially in the situation like this one before the court where a stockholder is seeking to recover for the breach of trust by officers and directors of the corporation, if it is held that only persons with a claim in excess of $10,000.00 may institute a class action. With such reasoning, it is not inconceivable that corporate directors could be totally immune from suit in a federal court, although there could be literally hundreds of stockholders with a legitimate cause of action against the directors. Consequently, this court will permit aggregation of amounts where a class action is otherwise validly instituted."

The District Court for the Northern District of Illinois in **Booth v. General Dynamics Corporation**, 264 F. Supp. 465 (N. D. Ill.) held that aggregation of claims under amended Rule 23 is proper. The Court stated at page 470:

"The recent amendments to the Federal Rules of Civil Procedure have extinguished the tortured distinction between 'true' and 'spurious' class actions. New standards for determining whether a class action is maintainable were established under the new Rule 23. It is by these new standards, rather than under the outworn authorities cited by the present litigants, that we must determine whether this suit may be maintained as a class action, * * *."

* * * * * * * *

"* * * Without the class action device, the aggregation of claims necessary to meet the jurisdictional amount requirement would be so difficult that the perpetrators of illegal transactions such as are alleged here would enjoy something akin to immunity in the federal courts" (Id. at 472).

Judge Alexander Holtzoff, recognizing the intentions and purposes of Amended Rule 23 to broaden and make more flexible said Rule has, in commenting on the new Amended Rules, stated that:

"The Rules as to class actions is broadened and made more flexible. This distinction between true, hybrid and spurious class actions is abrogated. The ultimate result is that as liberal as the Rules were, the progressive Amendments now adopted make them still more liberal and still more flexible." **Holtzoff, a Judge Looks at the Rules,** Rules of Civil Procedure and Judicial Code, p. 19 (1966 Ed.).

Charles Alan Wright, Professor of Law at the University of Texas and a member of the Committee on Rules of Practice and Procedure which drafted the revised rules, and who has long been a leading authority on the Federal Rules, in commenting on the broadened and more flexible purposes of Amended Rule 23, stated:

"• • • it was held under the former rule that aggregation of the claims of all members of the class was permitted in the 'true' class action, where the rule required a 'joint' or a 'common' interest, but not in 'hybrid' or 'spurious' class actions. The amended rule nowhere refers to a 'joint' or a 'common' interest. **It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy.** This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts 'fritter away their time in the trial of petty controversies.' A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached." **Barron & Holtzoff, Federal Practice and Procedure**, Sec. 569 (Supp., p. 58, 1966). (Emphasis supplied.)[1]

CONCLUSION.

Amended Rule 23 abrogates for all purposes the distinction between "hybrid", "true", and "spurious" class actions. It eliminates these terms of art completely. In their stead, the rule creates three types of class action which are delineated on the basis of the **consequences** of the class action rather than the "jural" relationship of the members of the class.

The revision to Rule 23 has a practical sensibility which would be virtually destroyed if the judgment of the Court of Appeals be upheld. The consequence of dismissal would be to thrust individual shareholders into state courts to

[1] See also Professor Cohn's article on the New Federal Rules of Civil Procedure in the Georgetown Law Journal, Vol. 54, pages 1213 to 1228.

institute these actions thus encouraging hundreds of suits flung out across the country with the consequent likelihood of disparate judgments. The cost of prosecuting the claims would be enormous both to the defendants and to the plaintiffs. In fact a dismissal herein might well serve to render it economically impractical to attempt enforcement of the claims of the small shareholders injured by the defendants' illegal sale of their offices. The cost of investigating and pursuing an individual action is prohibitive for the small shareholder. Small shareholders can now obtain a just adjudication of their claims largely because of the economics of the class action device. The consequence of the Court of Appeals judgment could very well be to render Amended Rule 23 sterile as a workable procedural tool.

For all the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

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APPENDIX A.

Rule 23.

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or correspond-

ing declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any

member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When approprite (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom

allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX B.

United States District Court, Eastern District of Wisconsin.

Margaret E. Snyder, Also Known as Peg Snyder,
Plaintiff,
v.
Harry L. Epstein and Benjamin Marcus,
Defendants.
No. 66-C-329.

OPINION AND ORDER.

The complaint in this case was filed December 1, 1966. Defendants filed motions to dismiss the action and, in the alternative, to order that the action not be maintained as a class action. The complaint was amended and the amended version was received by this court on March 24, 1967. Affidavits in support of defendants' previous motions were filed, and on April 10, 1967, a hearing was held on these motions. Because of other similar (if not identical) cases pending in other circuits, it was agreed by the parties that this court should withhold decision on the motions until the Circuit Court of Appeals of the Eighth Circuit decided a matter there on appeal involving the same plaintiff as in this action and raising at least one of the questions raised here. The Eighth Circuit issued its opinion in **Snyder v. Harris**, 390 F. 2d 205, on February 27, 1968.

The allegations in this action are somewhat complex and require a rather lengthy summary. Essentially, plaintiff in this case alleges that she is a resident of the State

of Arizona; that defendants, Harry L. Epstein and Benjamin Marcus, are residents of Milwaukee, Wisconsin; that Missouri Fidelity Union Trust Life Insurance Company (hereinafter referred to as "Missouri Fidelity") is a corporation that issues and sells policies of life insurance; that National Western Life Insurance Company (hereinafter referred to as "National Western") is a Colorado corporation; that plaintiff was, and still is, the owner of 2,000 shares of Missouri Fidelity stock; that the bylaws of Missouri Fidelity provide for a Board of Directors consisting of fifteen directors; that the defendants, Harry L. Epstein and Benjamin Marcus, were directors of Missouri Fidelity and that on November 22, 1966, the market price of Missouri Fidelity stock was about $2.63 per share; that some time prior to November 22, 1966, National Western submitted to directors of Missouri Fidelity a proposal to purchase all the shares owned by them for $7.00 per share, conditioned, however, first upon the resignation of all the directors of Missouri Fidelity except four, and further that five nominees of National Western be elected as directors of Missouri Fidelity and that such nominees be also named and elected as a majority of the executive committee and of the investment committee of Missouri Fidelity; that on or about November 22, 1966, National Western entered into such an agreement with eight directors of Missouri Fidelity, including defendants, Harry L. Epstein and Benjamin Marcus, to pay them and their friends and relatives $7.00 per share for an aggregate of approximately 300,000 shares of Missouri Fidelity then owned by them; that at a Board of Directors meeting held in St. Louis, Missouri, pursuant to such agreement, eight directors, including defendants, Harry L. Epstein and Benjamin Marcus, resigned as directors of Missouri Fidelity, and the nominees of National Western were named and elected as directors of Missouri Fidelity and as a majority of the executive committee

and of the investment committee of Missouri Fidelity; that four of the directors of Missouri Fidelity did not participate towards the effectuation of the aforesaid acts and did not resign; that three directors who also did not participate in the effectuation of the aforesaid acts did resign; that the aggregate amount paid by National Western for said 300,000 shares was approximately $1,200,000.00 in excess of the market value of said shares and was a premium paid to said selling shareholders for the resignation of said directors and for obtaining control of the executive committee and the investment committee of Missouri Fidelity by National Western; that the conduct and acts of the eight directors, including defendants, Harry L. Epstein and Benjamin Marcus, who agreed to sell their shares and who resigned pursuant to such agreement, were a breach of trust and violation of their fiduciary duties as directors of Missouri Fidelity; that the class of shareholders of Missouri Fidelity consists of more than 4,000 persons residing in different states; that plaintiff brings this action on behalf of herself and all other shareholders of Missouri Fidelity similarly situated; that questions of law or fact herein are common to said class and claims of plaintiff are typical of the claims of said class of shareholders of Missouri Fidelity similarly situated; that plaintiff can and will adequately and fairly represent the interest of said class; and that the prosecution of separate actions by individual members of said class would risk inconsistent or varying adjudications which would establish incompatible standards of conduct for the parties opposing the said class.

Defendants reply to this complaint by moving to dismiss on five alternative grounds. The defendants contend that:

1. Plaintiff failed to state a claim upon which relief can be granted in an action as an individual shareholder;

2. Plaintiff did not state a claim upon which relief can be granted in a derivative action;

3. Plaintiff has failed to follow the requirements of Rule 19 of the Federal Rules of Civil Procedure by failing to join certain indispensable parties—the six other directors whose conduct is alleged as a breach of trust—and by failing to indicate who these other parties are and why they were not joined;

4. Plaintiff does not satisfy the requirements for the maintenance of a class action under Rule 23 of the Federal Rules of Civil Procedure; and

5. Plaintiff fails to satisfy the jurisdictional requirement of the federal district courts in diversity cases in that plaintiff's individual claim is not more than $10,000.00.

I. Does plaintiff allege facts upon which relief can be granted?

To deal with defendants' contentions, of course, it must be assumed that all of plaintiff's factual allegations are true. Inferences from these facts must also be drawn in the light most favorable to plaintiff to determine whether a cause of action is pleaded.

The plaintiff in effect alleges that the defendants sold their corporate offices and control of the corporation in return for a premium of $1,200,000.00 on the stock purchased from them and others. The sale of a corporate office gives rise to a cause of action for breach by such officer of the fiduciary duties owed to both the corporation and the stockholders. **Securities and Exchange Commission v. Insurance Securities**, 254 F. 2d 642 (9th Cir. 1958). Many courts take the position that this may be the basis for action by individual stockholders even though the action is sometimes denominated derivative. **Vine v. Ben-**

eficial Finance Co., Inc., 374 F. 2d 627 (2d Cir. 1967); **Perlman v. Feldman**, 219 F. 2d 173 (2d Cir. 1955); **Borak v. J. I. Case Company**, 317 F. 2d 838 (7th Cir. 1963).

It is clear that one set of facts may give rise to a cause of action in favor of either the corporation or the individual stockholder or both. **Borak v. J. I. Case Company**, supra; **Brown v. Bullock**, 194 F. Supp. 207 (S. D. N. Y. 1961), aff'd 294 F. 2d 415 (2d Cir. 1961). The facts in this case appear to this court to present such a situation. Reasonable inferences can be drawn from the pleaded facts which support a cause of action for breach of trust either as to the individual stockholders who were not offered $7.00 per share for their stock or as to the corporation whose controlling positions on the Board of Directors, executive committee, and investment committee were sold. Since the complaint could reasonably be read to state either an individual or a derivative cause of action, this court is of the opinion that defendants' motion to dismiss for failure to state a cause of action must be denied.

II. **Has plaintiff failed to satisfy Rule 19?**

Defendants further contend that plaintiff has failed to satisfy the requirements of Rule 19 of the Federal Rules of Civil Procedure by failing either to join the other directors who took part in the alleged sale or to supply their names and addresses and reasons why they were not joined. It is undisputed that eight directors were involved in the acts of which plaintiff complains, and that only two of such directors were made parties defendant in this action. The formal record in this case does not indicate the identity or location of any of the other directors. The briefs do refer to **Snyder v. Harris**, 268 F. Supp. 701 (E. D. Mo. 1967), aff'd 390 F. 2d 204 (8th Cir. 1968), wherein the same plaintiff, in an action

similar to this one, arising out of the same facts, sought to sue two other members of the Board of Directors. The courts therein held that Rule 23 did not allow the plaintiff in a class action to aggregate her claim with those of other class members whom she represented for purposes of satisfying the jurisdictional amount under § 1332, 28 U. S. C. The question of proper joinder under Rule 19 was never reached.

It appears to this court that such other directors are contemplated by the language of Rule 19 which states in relevant part:

> "(a) **Persons to be Joined if Feasible.** A person * * * shall be joined as a party in the action if * * * (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. * * *"

It also appears that the 1966 change in the language of this rule has removed the necessity for the technical classification of a person as "necessary" or "indispensable" to the action but still directs the court to engage in a pragmatic weighing of the equities involved. Barron & Holtzhoff, Federal Practice & Procedure, §§ 511-512 (Wright ed., 1967 Supplement); **Imperial Appliance Corp. v. Hamilton Mfg. Co.**, 263 F. Supp. 1015 (E. D. Wis. 1967).

In the view of this court, the fact that plaintiff has not at this point joined or identified the other directors does not require dismissal of the complaint at this time. Rule 21 of the Federal Rules of Civil Procedure clearly allows the joinder of parties at any time in the proceed-

ings, subject to the discretion of the court. 3A Moore, Federal Practice, at 2905-2907 (2d ed. 1968); 2 Barron & Holtzhoff, Federal Practice and Procedure, at 212-213 (Wright ed.). Consequently, this court is of the opinion that plaintiff should comply with Rule 19 by either joining the remaining six directors or by identifying them and pleading the reasons why they are not joined.

III. Is this a proper class action?

Defendants further contend that plaintiff does not satisfy the requirements of Rule 23 for the maintenance of a class action. Plaintiff alleges that there are approximately 4,000 stockholders of Missouri Fidelity, but does not indicate how many of these are "similarly situated" to plaintiff in that they were not offered $7.00 per share for their stock on or about November 22, 1966. Consequently, this court cannot at this time find that plaintiff represents a class "so numerous that joinder of all members is impracticable." In the interest of justice, the plaintiff should be permitted to amend her complaint to meet this requirement, if she can. It does appear, however, that there are questions of law or fact common to the persons plaintiff seeks to represent, that the claims of the plaintiff are typical of the claims of the shareholders who were not offered $7.00 per share for their stock on or about November 22, 1966, and that plaintiff will fairly and adequately protect the interests of the class.

IV. Does this court have jurisdiction under 28 U. S. C., § 1332?

The next question to consider is whether this court has jurisdiction of this matter on the basis of the amount in controversy. Plaintiff contends that a total premium of $1,200,000.00 was paid to the directors and their friends and relatives. She does not claim this entire amount is due and owing to her by virtue of the breach of trust

alleged. Rather, she claims, as this court reads the complaint, that the $1,200,000.00 should be divided among the shareholders "similarly situated" to the plaintiff. It does not appear that plaintiff claims $10,000.00 on her own behalf. Consequently, plaintiff, by herself, has failed to satisfy the jurisdictional requirements of 28 U. S. C., § 1332.

In the event plaintiff amends her complaint to bring herself within the scope of Rule 23, the question before the court will be whether aggregation of claims of the class will be permitted in order to satisfy the requirements of 28 U. S. C., § 1332. This question has already been extensively briefed by the parties. In the interest of expediting this controversy, and since the decision on this question could be dispositive of this controversy at this time, this court will express its opinion on this question.

There is a conflict of opinion among the circuits on the question of aggregation of claims in a class action. The Eighth Circuit in **Snyder v. Harris**, 390 F. 2d 204 (1968), has adopted the view that aggregation is not to be permitted. This position is based on the reasoning that the 1966 amendment of Rule 23 did not change the prior distinctions among various types of class actions. Consequently, the old distinctions of "true," "hybrid," and "spurious" class actions must be maintained, at least when dealing with the jurisdictional amount. On this reasoning, the action between Mrs. Snyder, plaintiff in the action before this court, and Charles Harris and Earl W. Kirchhoff, past directors in Missouri Fidelity, was dismissed.

The Fifth Circuit in **Alvarez v. Pan American Life Insurance Co.**, 375 F. 2d 992 (1967), has also held that separate claims could not be aggregated to make the jurisdictional amount required under the diversity statute, even if new Rule 23 relating to class actions were applied.

In the Fifth and Eighth Circuits, the courts were persuaded that the principle of aggregation falls within the scope of jurisdiction which has been traditionally left to Congress rather than in the rule-making power delegated to the Supreme Court by Congress, and that to permit the aggregation of claims would amount to increasing the jurisdiction of the court by the rule-making authority. These courts reason that by permitting the aggregation of separate and distinct claims in a class action, they would violate Rule 82 which provides in part: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts * * *."

The Tenth Circuit has also considered this question in **Gas Service Company v. Coburn,** 389 F. 2d 831 (1968), and has reached a different conclusion. Here a customer of the Gas Service Company instituted a class action to recover amounts charged by the Gas Service Company which were above the statutory rates authorized. It was undisputed that the amount claimed by the individual plaintiff was $7.81. The Tenth Circuit, however, allowed aggregation of claims and refused to dismiss the suit. The court reasoned that the 1966 amendment to Rule 23 removed complex and inefficient distinctions within the concept of class actions. The court stated at page 834:

> "* * * The Advisory Committee's Note, 39 F. R. D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as 'true,' 'hybrid,' and 'spurious.' 'In practice,' said the Committee, 'the terms "joint," "common," etc., which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain.' These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now

> recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of 'true,' 'hybrid' and 'spurious' must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard."

The Seventh Circuit, of which this court is a part, has not passed on this question, but the subject has divided the judges of the Northern District of Illinois.

Judge Napoli in **Lesch v. Chicago & Eastern Illinois Railroad Company**, 279 F. Supp. 908 (N. D. Ill. 1968), held that the jurisdictional amount may not be satisfied by aggregating the claims of the entire class, but Judge Will in **Booth v. General Dynamics Corporation**, 264 F. Supp. 465, 470 (N. D. Ill. 1967), stated:

> "The recent amendments to the Federal Rules of Civil Procedure have extinguished the tortured distinction between 'true' and 'spurious' class actions. New standards for determining whether a class action is maintainable were established under the new Rule 23. It is by these new standards, rather than under the outworn authorities cited by the present litigants, that we must determine whether this suit may be maintained as a class action, * * *."

In allowing the class action to proceed, Judge Will went on to say at page 472:

> "* * * Without the class action device, the aggregation of claims necessary to meet the jurisdictional amount requirement would be so difficult that the perpetrators of illegal transactions such as are alleged here would enjoy something akin to immunity in the federal courts."

It appears to this court that the reasoning of the Tenth Circuit and of Judge Will is more useful and in

keeping with the position taken by the Advisory Committee. See Advisory Committee's Note to Rule 23 in 39 F. R. D. 69 at page 98. Also see Professor Charles Alan Wright's note in the 1967 Supplement, at 106, to 2 Barron & Holtzoff, Federal Practice and Procedure, § 569, wherein he stated:

> "* * * It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. * * *"

Also see Professor Cohn's article on the New Federal Rules of Civil Procedure in the Georgetown Law Journal, Vol. 54, pages 1213 to 1228.

The purposes of class actions would be largely defeated, especially in the situation like this one before the court where a stockholder is seeking to recover for the breach of trust by officers and directors of the corporation, if it is held that only persons with a claim in excess of $10,000.00 may institute a class action. With such reasoning, it is not inconceivable that corporate directors could be totally immune from suit in a federal court, although there could be literally hundreds of stockholders with a legitimate cause of action against the directors. Consequently, this court will permit aggregation of amounts where a class action is otherwise validly instituted.

It Is Therefore Ordered that defendants' motions to dismiss on the ground that plaintiff has failed to state a claim upon which relief can be granted be and they are hereby denied.

It Is Further Ordered that plaintiff be allowed twenty days from the date of this opinion and order to amend her complaint to satisfy the requirements of Rule 19 of the Federal Rules of Civil Procedure, and that plaintiff further be allowed to amend to allege facts sufficient to in-

yoke the jurisdiction of this court, either as in a class action pursuant to Rule 23 or as to plaintiff as an individual to satisfy the jurisdictional requirements of 28 U. S. C., § 1332. Upon failure to amend within such time, this action will be dismissed.

Dated at Milwaukee, Wisconsin, this 22nd day of October, 1968.

John W. Reynolds,
U. S. District Judge.